(2) (2)

Nos. 90-926, 90-966

In The

# Supreme Court of the United States

October Term, 1990

STATE OF MICHIGAN;
and MICHIGAN PUBLIC SERVICE COMMISSION,

*Petitioners in No. 90-926,*

and

ALLIED DELIVERY SYSTEM, INC.;
ALVAN MOTOR FREIGHT, INC.;
and PARKER MOTOR FREIGHT, INC.,

*Petitioners in No. 90-966,*

vs.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA; and
HOVER TRUCKING COMPANY OF MICHIGAN,

*Respondents.*

## BRIEF OF RESPONDENT HOVER TRUCKING COMPANY IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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## COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER THE INTERSTATE COMMERCE COMMISSION ACTED ARBITRARILY, CAPRICIOUSLY, OR IN EXCESS OF STATUTORY AUTHORITY IN FINDING THAT HOVER TRUCKING COMPANY OF MICHIGAN'S METHOD OF CONDUCTING ITS INTERSTATE TRUCKING OPERATION IS "REASONABLE, LOGICAL, AND NORMAL."

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### COUNTER-STATEMENT OF THE CASE

Respondent Hover Trucking Company ("Hover")[1] accepts the procedural history of this case submitted by

[1] Hover Trucking Company of Michigan, a Michigan corporation, the Defendant and Appellee in the proceedings below, was merged into Hover Trucking Commpany, an Indiana corporation, effective December 3, 1989. That merger does not affect the issues in this proceeding and the corporate entities will be referred to jointly as "Hover." Hover Trucking Company has no parent or subsidiary corporations.

Petitioners. For a factual summary of the case, Hover asks that the Court refer to the "Background" portion of the Interstate Commerce Commission decision below. (20a-25a)[2]

## SUMMARY OF ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

Petitioners advance no convincing explanation as to why this Court should venture into the technical *minutiæ* of a case involving a statutorily based principle of law resolved conclusively by this Court in 1959. The sole issue in this case is whether the Interstate Commerce Commission ("ICC") properly exercised its jurisdiction under 49 USC § 10521(a)(1)(B) to regulate transportation "between a place in a State and another place in the same State through another State." Employing an analysis specifically approved by this Court in *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959), the ICC ruled that Hover's decision to perform service between points in Michigan through a "hub" terminal at South Bend, Indiana, along with service between five other midwestern states was "reasonable, logical, and normal." This is the very test approved and applied by this Court in *Service Storage*. Petitioners' unwarranted claims that the ICC used improper methods for calculating "circuity" in Hover's operation or assessing alleged evidence of "bad faith" fall far short of justifying reentry by this Court into an area of law which has been well settled for over thirty years.

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[2] All references to Appendix pages in this brief are to the Appendix to the petition of the State of Michigan, et al., in No. 90-926.

## ARGUMENT

Notwithstanding Petitioners' claims of undue interference and impending destruction of restrictive state regulation of intrastate commerce, the fact remains that Congress has explicitely stated that transportation between points in a single state through another state is interstate commerce subject to the statutory authority of the ICC. 49 USC § 10521(a)(1)(B). Any concerns which might have existed as to the relative primacy of state and federal regulatory systems over shipments moving between points in a single state via routes through another state thus have been resolved conclusively by Congress. That resolution places the shipments at issue squarely within the jurisdiction of the ICC. The possibility that the ICC's regulation of market entry or rate levels may be less restrictive than comparable state regulation is irrelevant. Once a shipment between two points in a state crosses a state line, the unambiguous Congressional determination is that federal regulation by the ICC becomes applicable. *Greyhound Lines* v. *Mealey*, 334 U.S. 653, 660-61 (1948); *Gray Lines Tours* v. *ICC*, 824 F.2d 811 (9th Cir. 1987). The provisions of 49 USC § 10521(b) which preserve the residual powers of states to regulate intrastate transportation not regulated by the ICC do not limit the ICC's powers over the transportation of shipments which Congress has specifically directed the ICC to regulate.

While ICC case law has held that sufficiently strained or illogical routing of shipments between points in a single state through an adjoining state could be found to be a misuse of a carrier's ICC certificate, the ICC's decision that the facts of this case do not warrant such a finding cannot be considered arbitrary or capricious. One factor employed by the ICC to

evaluate alleged illogic in routing single-state shipments through an adjoining state is the mileage circuity of the interstate routings when compared to the short-line mileage. Hover argued that the proper test was to consider the mileage circuity of shipments moving between Michigan and *all* points on the Hover system via the South Bend "hub" terminal. The record indicated that Hover mixed its Michigan-to-Michigan shipments with shipments from Michigan to other states, and *vice versa* when moving shipments through South Bend. The method of analysis proposed by Hover allowed Hover to demonstrate that possible operating disadvantages of high circuity on Michigan-to-Michigan shipments could be outweighed by the benefits of low circuity on shipments between Michigan and other states. The ICC agreed with Hover's method of anaylsis. (27a)

Petitioners' argument that the ICC had not previously employed such an analysis ignores the fact that the ICC is free to make appropriate choices or alterations in its analytical methods as long as proper explanation is provided. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The ICC is not required to follow methodology employed in past cases when confronted with distinct fact situations such as those presented by Hover's "hub" method of conducting multi-state operations through a single terminal in South Bend.

There similarly was no error by the ICC in its consideration of alleged evidence of actual "bad faith" motivation of Hover in establishing its South Bend "hub" terminal. The evidence cited by Petitioners involves a statement by Hover's President to a news reporter in 1983 that opening of the South Bend facility would allow Hover to perform service between Mich-

igan points without holding authority from the Michigan Public Service Commission. (14a-15a) The ICC specifically analyzed this statement and concluded that it did not prove that Hover's purpose in establishing the South Bend terminal was to avoid regulation under Michigan law. (29a) The Sixth Circuit properly ruled that the ICC was entitled to interpret the evidence on this point and that such interpretation was not arbitrary or capricious. (9a)

Petitioners' final contention that the ICC was required to hold oral hearings in this matter is entirely without merit. The ICC considered the evidence in this case under its so-called "modified procedure" system described at 49 CFR 1112. This system satisfies all requirements of due process and procedural fairness required by the Constitution and the Administrative Procedure Act. 5 USC § 551, *et seq.*; *Trailways, Inc.* v. *ICC*, 681 F.2d 252 (5th Cir. 1982); *Crete Carrier Corp.* v. *U.S.*, 577 F.2d 49 (8th Cir. 1978). The ICC places extensive reliance on modified procedure to control what would otherwise be an unmanageable burden of oral hearings concerning cases subject to its jurisdiction. There is no basis for requiring any change in this long-approved procedural method.

## CONCLUSION

The Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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